7.1 Compensatory Damages[93]

[Updated: 6/14/02]

Pattern Jury Instruction

The fact that I instruct you on damages does not represent any view by me that you should or should not find [defendant] liable.

[Plaintiff] seeks to recover damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses.[94]

You must not consider any lost wages or fringe benefits. Federal law requires that I as the judge determine the amount of any lost wages and fringe benefits that [plaintiff] shall recover if you find [defendant] liable.[95] Distress arising from this lawsuit, or legal expenses incurred in this lawsuit must also not be included in these damages.[96] You must determine instead what other loss, if any, [plaintiff] has suffered or will suffer in the future caused by any [protected characteristic] discrimination that you find [defendant] has committed under the instructions I have given you. We call these compensatory damages. You may award compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses if you determine that [plaintiff] has proven by a preponderance of the evidence that [she/he] has experienced any of these consequences as a result of [protected characteristic] discrimination. No evidence of the monetary value of intangible things like emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses is available and there is no standard I can give you for fixing any compensation to be awarded for these injuries. Even though it is obviously difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, of the amount of emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic losses you find that [plaintiff] has undergone and can probably be expected to suffer in the future as a result of [defendant]'s conduct. And you must place a money value on this, attempting to come to a conclusion that will be fair and just to both of the parties. This will be difficult for you to measure in terms of dollars and cents, but there is no other rule I can give you for assessing this element of damages.

[97]{You may also award [plaintiff] prejudgment interest in an amount that you determine is appropriate to make [her/him] whole and to compensate [her/him] for the time between when [she/he] was injured and the day of your verdict. It is entirely up to you to determine the appropriate rate and amount of any prejudgment interest you decide to award.}

[98]{If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time, since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.[99]}

[100]{[Plaintiff] has the duty to mitigate [her/his] damages—that is, to take reasonable steps that would reduce the damages. If [she/he] fails to do so, then [she/he] is not entitled to recover any damages that [she/he] could reasonably have avoided incurring. [Defendant] has the burden of proving by a preponderance of the evidence that [plaintiff] failed to take such reasonable steps.}

[101]{[Defendant] contends that it would have made the same decision to [specify adverse action] because [describe the after-discovered misconduct]. If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [specify adverse action] because of [describe the after-discovered misconduct],[102] you should limit any award of damages to the date [defendant] would have made the decision to [specify adverse action] as a result of [the after-discovered misconduct].[103]}

[104]{Causation}

If you have found [defendant] liable to [plaintiff], but find that [her/his] damages have no monetary value, you may award [her/him] nominal or token damages[105] such as One Dollar ($1.00) or some other minimal amount.[106]

[107]{Tax Consequences}

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[93] This instruction is for Title VII, Pregnancy Discrimination Act, ADA, Rehabilitation Act, section 1981, and section 1983 cases. Use Instruction 7.2 for ADEA cases and Instruction 7.3 for Equal Pay Act cases.

[94] Although the language of section 1981a includes "future pecuniary losses" in the list of compensatory damages available, it has not been included in this instruction because of the possibility that its inclusion might confuse the jury. Moreover, because, as the Supreme Court recently ruled in Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 121 S. Ct. 1946, 1951 (2001) (Title VII) (Thomas, J.), front pay is not a "future pecuniary loss," it is not clear what damages might fit within the definition of "future pecuniary losses" in an employment discrimination case. See Hudson v. Reno, 130 F.3d 1193, 1204 (6th Cir. 1997) (Title VII) (Rosen, Dist. J., E.D. Mich.), overruled by Pollard, 532 U.S. 843, 121 S. Ct. at 1951 (commenting that "if the term [future pecuniary losses] does not refer to front pay, it is hard to see what it would refer to, as front pay has always been the heart of 'future pecuniary losses' in discrimination suits"); see also Pollard, 532 U.S. 843, 121 S. Ct. at 1951 ("The term 'compensatory damages . . . for future pecuniary losses' is not defined in the statute. . . .").

Therefore, unless a plaintiff provides evidence of a type of harm that might reasonably be classified as a "future pecuniary loss," this instruction avoids the problem of asking the jury to distinguish between front pay and a "future pecuniary loss."

[95] Back pay and benefits are not jury issues in Title VII or ADA cases. Two statutory sections, sections 1981a and 2000e-5(g) of Title 42, govern the damages available in a Title VII or ADA action. 42 U.S.C. §§ 1981a(b)(2), 2000e-5(g) (2001). Section 2000e-5(g) authorizes recovery of lost benefits, front pay, back pay, and interest on back pay. 42 U.S.C. § 2000e-5(g) (2001); see also Pollard, 532 U.S. 843, 121 S. Ct. at 1949 (outlining the damages available under sections 1981a and 2000e-5(g)). Section 1981a(b) complements section 2000e-5(g) by authorizing both compensatory and punitive damages in situations where section 2000e-5(g) authorized only equitable remedies. 42 U.S.C. § 1981a (2001); see also Pollard, 532 U.S. 843, 121 S. Ct. at 1949.

Section 1981a(a) authorizes a plaintiff to recover both: (1) the "compensatory and punitive damages" provided in section 1981a(b); and (2) "any relief authorized by" section 2000e-5(g). 42 U.S.C. § 1981a(a) (2001). However, section 1981a(b)(2) specifically excludes the relief authorized by section 2000e-5(g) from its definition of "compensatory damages." 42 U.S.C. § 1981a(b)(2) (2001). This distinction between the damages available under section 1981a and 2000e-5(g) is important because section 1981a(c) provides the right to a jury trial, whereas section 2000e-5(g) does not. 42 U.S.C. § 1981a(c) (2001) ("If a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury."); 42 U.S.C. § 2000e-5(g) (2001) ("If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."); see also Ramos v. Roche Prods., Inc., 936 F.2d 43, 49-50 (1st Cir. 1991) (Title VII) (Bownes, J.) ("The First Circuit still adheres to its long-held rule precluding jury trials for equitable remedies under Title VII.").

There is some discussion of whether the enactment of section 1981a changed this rule. See Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 121 S. Ct. 1946, 1948-49 (2001) (Title VII) (Thomas, J.); see also Landgraf v. USI Film Prods., 511 U.S. 244, 252 n.4 (1994) (Title VII) (Stevens, J.) ("We have not decided whether a plaintiff seeking backpay under Title VII is entitled to a jury trial."); Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 606 (D. Me. 1994) (ADA and ADEA) (Brody, J.) ("Whether a plaintiff who seeks backpay under either the ADA or Title VII is entitled to a jury trial is an open question." (citing Landgraf, 511 U.S. at 252 n.4)). However it is clear that the enactment of section 1981a did not change the remedies available under section 2000e-5(g), but rather provided additional remedies. Pollard, 532 U.S. 843, 121 S. Ct. at 1951-52 ("Congress therefore made clear through the plain language of the statute that the remedies newly authorized under § 1981a were in addition to the relief authorized by [section 2000e-5(g)].") More specifically, the Pollard Court held that even after the enactment of section 1981a, front pay was still an equitable rather than compensatory remedy. See id. Therefore, the well-established rule that the calculation of equitable remedies is within the discretion of the court, rather than subject to jury determination, continues to apply. See Lussier v. Runyon, 50 F.3d 1103, 1107-08 (1st Cir. 1995) (Rehabilitation Act of 1973, 29 U.S.C. § 794a (2001)) (Selya, J.) ("it follows *a fortiori* from the equitable nature of the remedy that the decision to award or withhold front pay is, at the outset, within the equitable discretion of the trial court"); Braverman, 859 F. Supp. at 606 (deciding that "[t]he Court will determine whether [the plaintiff] is entitled to backpay").

The total compensatory and punitive damages available under section 1981a (but not the benefits, front pay, back pay, or interest on back pay available under 42 U.S.C. § 2000e-5(g)) are limited according to the number of employees employed by the defendant. 42 U.S.C. § 1981a(b)(3); Pollard, 532 U.S. 843, 121 S. Ct. at 1951 (holding that front pay, like back pay, is excluded from the damages cap in section 1981(b)(3)). However, the section also provides that "the court shall not inform the jury of [these] limitations." 42 U.S.C. § 1981a(c)(2).

But, in section 1983 cases, back pay is an issue for the jury as long as the plaintiff seeks some measure of compensatory damages in addition to back pay; if the plaintiff seeks only back pay, or back pay and reinstatement, then the calculation of the back pay award is an issue for the court rather than the jury. Saldana Sanchez v. Vega Sosa, 175 F.3d 35, 36 (1st Cir. 1999) (Section 1983) (Selya, J.) (citing Santiago-Negron v. Castro-Davila, 865 F.2d 431, 441 (1st Cir. 1989) (Section 1983) (Bownes, J.)). Although not discussed explicitly in the case law, this same principle would presumably apply to section 1981 cases, and to an award of front pay under either section. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975) (Title VII and section 1981) (Blackmun, J.) ("An individual who establishes a cause of action under s. 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."); Sinai v. New England Tel. & Tel. Co., 3 F.3d 471, 476 (1st Cir. 1993) (Title VII and section 1981) (Torruella, J.) ("The jury was presented in the § 1981 claim with evidence concerning back pay, front pay, and emotional distress, and instructed to determine the appropriate level of damages for them."); T & S Serv. Assoc., Inc. v. Crenson, 666 F.2d 722, 728 n.7 (1st Cir. 1981) (Section 1981) (Coffin, J.) ("Without deciding the issue, we note that the proper inquiry under s. 1983 would likely focus on compensation, as under s. 1981."); Hiraldo-Cancel v. Aponte, 925 F.2d 10, 13 (1st Cir. 1991) (Section 1983) (Cyr, J.) (holding that an award of reinstatement is an equitable remedy, and thus within the discretion of the court). Therefore, it might be necessary to add a back pay component to this instruction in some section 1981 or 1983 cases.

[96] See, e.g., Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 79 (1st Cir. 2001) (Selya, J.) (a case under Massachusetts discrimination law, but recognizing that "the heavy weight of authority holds that litigation-induced stress is not ordinarily recoverable as an element of damages") (citing Picogna v. Bd. of Educ. of Cherry Hill, 143

N.J. 391, 671 A.2d 1035, 1038 (N.J. 1996); Stoleson v. United States, 708 F.2d 1217, 1223 (7th Cir. 1983) (Posner, J.)).

[97] There is some conflict in the caselaw, however, about whether this is a question for the jury or for the court. In a section 1983 case, "it is the jury that must decide whether prejudgment interest is warranted." Foley v. City of Lowell, Mass., 948 F.2d 10, 17 (1st Cir. 1991) (section 1983) (Selya, J.); accord Cordero v. De Jesus-Mendez, 922 F.2d 11, 13 (1st Cir. 1990) (section 1983) (Bownes, J.) ("There can be no doubt that in this circuit the decision to award prejudgment interest in a federal question case lies within the sole province and discretion of the jury."); id. ("[I]n an action brought under 42 U.S.C. § 1983, the issue of prejudgment interest is so closely allied with the issue of damages that federal law dictates that the jury should decide whether to assess it.") (citing Furtado v. Bishop, 604 F.2d 80, 97-98 (1st Cir. 1979) (section 1983) (Bownes, J.)). But see Gierlinger v. Gleason, 160 F.3d 858, 873-74 (2d Cir. 1998) (section 1983) (Kearse, J.) ("In a suit to enforce a federal right, the question of whether or not to award prejudgment interest is ordinarily left to the discretion of the district court …."). If a section 1983 plaintiff fails to ask the jury for prejudgment interest, he or she may not later ask the judge to award it. Foley, 948 F.2d at 17; Cordero, 922 F.2d at 13.

However in other types of cases, the First Circuit has generally held that "[t]he decision to award prejudgment interest is within the discretion of the trial court." Criado v. IBM Corp., 145 F.3d 437, 446 (1st Cir. 1998) (ADA) (Godbold, J.); accord Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 383 (1st Cir. 1998) (Title VII) (Boudin, J.); Hogan v. Bangor & Aroostook R.R. Co., 61 F.3d 1034, 1038 (1st Cir. 1995) (ADA) (Lynch, J.); Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA) (Cyr, J.); Conway v. Electro Switch Corp., 825 F.2d 593, 602 (1st Cir. 1987) (Title VII) (Pettine, Sr. Dist. J., D.R.I.); cf. Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 648 F.2d 761, 763 (1st Cir.) (sections 1981 and 1983) (Coffin, J.) ("we agree" that "prejudgment interest is required to make injured parties whole when the injuries they suffer are not 'intangible'"), rev'd on other grounds by 454 U.S. 807 (1981). However, in at least one case, the court made this statement even though the trial court submitted the question of prejudgment interest to the jury. Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 960-61 (1st Cir. 1995) (Title VII and EPA) (Keeton, Dist. J., D. Mass.). In another case, the court implied that prejudgment interest is a jury question, citing the rule that governs prejudgment interest in 1983 cases: "[P]laintiff did not request prejudgment interest from the jury. He was therefore barred from subsequently seeking it from the judge." Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982) (ADEA) (Campbell, J.).

This confusion likely flows from the language of the court's holding in Earnhardt v. Puerto Rico, 744 F.2d 1 (1st Cir. 1984) (Title VII) (Bownes, J.), language that has been cited in most of the subsequent cases to discuss the issue. In Earnhardt, a bench trial where the plaintiff did not request prejudgment interest until he filed a motion to amend the judgment, the First Circuit held (without citation to any other authority):

> The determination of the amount of damages is, absent legal error, a matter for the finder of fact. It cannot be said that either prejudgment interest or an award for lost fringe benefits must, as a matter of law, be part of the damages awarded in a Title VII case. The question of whether they are necessary to make a plaintiff whole is within the discretion of the district court.

Id. at 3.

Considering all of these cases, it appears that the rule in the First Circuit is that prejudgment interest is a jury question in section 1983 cases. For employment discrimination cases other than section 1983 cases, an award of prejudgment interest is within the court's discretion, but the court may also exercise that discretion by submitting the question to the jury. This bracketed paragraph may be used in cases where the question of prejudgment interest is submitted to the jury.

[98] These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future losses, such as retirement benefits, that must be reduced to net present value. See Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) (ADEA) (Campbell, J.) ("any pension benefits due a prevailing plaintiff normally should be liquidated as of the date damages are settled, and should approximate the present discounted value of plaintiff's interest" (internal citation omitted)).

[99] "The discount rate should be based on the rate of interest that would be earned on the 'best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (longshoreman's workers' compensation) (Stevens, J.) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916) (Federal Employers' Liability Act) (Pitney, J.)). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; Kelly, 241 U.S. at 490-91.

[100] This bracketed paragraph may be used in cases where the plaintiff's duty to mitigate damages is an issue. See Hazel v. U.S. Postmaster Gen., 7 F.3d 1, 5 (1st Cir. 1993) (ADEA and Title VII) (Feinberg, J., 2d Cir.) (holding that plaintiff could not recover, even if he proved discrimination, because he failed to mitigate his damages).

[101] This bracketed paragraph may be used in cases where the defendant argues that it was entitled to take the challenged employment action because of after-acquired information about misconduct by the plaintiff. Although information acquired after the challenged employment action may not be considered when assessing the defendant's liability, it may be relevant to the amount of the plaintiff's damages. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-63 (1995) (ADEA) (Kennedy, J.), cited in Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 146 n.9 (1st Cir. 1997) (ADA) (Lynch, J.); Serafino v. Hasbro, Inc., 82 F.3d 515, 519 (1st Cir. 1996) (Title VII) (Coffin, J.); see also Sabree v. United Bhd. of Carpenters and Joiners Local No. 33, 921 F.2d 396, 404-05 (1st Cir. 1990) (Title VII) (Pettine, Sr. Dist. J., D.R.I.). This bracketed paragraph is not appropriate when the defendant knew of the misconduct in question before it took the challenged employment action. See Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996) (Title VII) (Selya, J.).

[102] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995) (ADEA) (Kennedy, J.) ("[A]n employer seek[ing] to rely upon after-acquired evidence of wrongdoing . . . must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.").

[103] The effect of after-acquired evidence of misconduct on the calculation of damages is not precisely defined. In McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-62 (1995) (ADEA) (Kennedy, J.), the Court noted that, "as a general rule . . . neither reinstatement nor front pay is an appropriate remedy," and that "[t]he beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered." The Court added that: "In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party." Id. at 362. We have not resolved how to account for such "extraordinary equitable circumstances" in this jury charge.

[104] This instruction does not include language for use in cases where there is a question as to whether the defendant's conduct caused the plaintiff's injury. In a case where the causal link between the challenged conduct and the claimed damages is disputed (e.g., when the plaintiff claims emotional injury and the defendant claims that other factors in the plaintiff's environment caused the emotional distress), it will be necessary to add appropriate causation language.

[105] In Kerr-Selgas v. American Airlines, Inc., 69 F.3d 1205, 1214-15 (1st Cir. 1995) (Title VII) (Cyr, J.), the court held that: "Although nominal damages are recoverable in intentional discrimination cases under 42 U.S.C. § 1981a(a)(1), . . . a liability verdict [does not] *compel[]* such an award absent a timely request." See also Provencher v. CVS Pharmacy, 145 F.3d 5, 11 n.4 (1st Cir. 1998) (Title VII) (Coffin, J.).

[106] According to Romano v. U-Haul Int'l, 233 F.3d 655, 671 (1st Cir. 2000) (Title VII) (Torruella, C.J.), nominal damages are not limited to $1, but $500 is too high. See also Magnett v. Pelletier, 488 F.2d 33, 35 (1st Cir. 1973) (Section 1983) (per curiam).

[107] Whether the damages a plaintiff recovers are taxable depends on both the statutory source of the recovery and the type of injury the plaintiff sustained, because the federal tax code excludes from taxable income "any damages . . . received . . . on account of personal physical injuries or physical sickness." 26 U.S.C. § 104; see also, e.g., O'Gilvie v. United States, 519 U.S. 79 (1996) (tax case; medical malpractice) (Breyer, J.) (punitive damages awards are taxable); Commissioner v. Schleier, 515 U.S. 323 (1995) (tax case; ADEA) (Stevens, J.) (back pay and liquidated damages awards in ADEA case are both taxable); United States v. Burke, 504 U.S. 229 (1992) (tax case; Title VII) (Blackmun, J.) (before 1991 amendment, Title VII damages were not "tort-like" and thus were taxable); Dotson v. United States, 87 F.3d 682, 685-86 (5th Cir. 1996) (tax case; ERISA) (Dennis, J.) (applying Schleier and Burke in ERISA case); Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (section 1983) (Anderson, J.) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989) (Title VII and section 1983) (Gee, J.) ("The distinction between the § 1983 award and the Title VII award is important for federal income tax purposes."); Thompson v. Commissioner, 866 F.2d 709, 712 (4th Cir. 1989) (Wilkins, J.) (tax case: Title VII and Equal Pay Act). As a general rule, tort-type damages are non-taxable, even if they include damages based on the plaintiff's lost wages, but an award that more closely resembles contract damages, such as an award of back pay, is taxable.

Even after the tax status of each element of a plaintiff's claimed damages is properly established, it is not clear how the tax status of any particular element should affect the final calculation of damages. For example,

consider a case involving lost wages. If those wages had been paid properly, they would have been taxed when earned. Therefore, an argument could be made that any award should be reduced to reflect the after-tax value based on the tax rate the plaintiff was subject to in the year in question. On the other hand, an amount the plaintiff receives for those lost wages may be taxable when the plaintiff receives them; thus an argument could be made that the plaintiff's damages should be enhanced so that the he or she actually receives, after taxes, the amount the jury awarded. As a practical matter, these two factors may offset each other, in which case there is no reason to include a jury instruction about the tax consequences of an award. For an example of the difficulty of resolving this issue, see Wulf, 883 F.2d at 873. See also Johnston, 869 F.2d at 1580 ("We decline to require district courts to act as tax consultants every time they grant back pay awards, speculating as to what deductions and shelters the plaintiff will find, and then calculating the plaintiff's potential tax liability.")

This instruction does not attempt to resolve these issue. In a case where the tax consequences of all or part of a damages award are at issue, it will be necessary to supplement the language of this instruction to reflect the particular circumstances of that case.